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# In the Supreme Court of the United States

October Term, 1959

No. 200

In the Matter of the Estate of Jessie M. Pierce,

*Deceased.*

Agnes M. Sargent, Gertrude M. Sargent, Marjorie Goodwin, Guardian and Lawful of Helen M. Sargent, Jr., Frank M. Howell, Jr., Olive P. Howell, Mary Etta Gass Bundy, Elizabeth Gass Hassell, Louise Evans, Fred Howell, Courtenay Moth Mebane, Frank Moss and Margaret Moss White,

*Petitioners,*

vs.

The Board of Trustees of the Leland Stanford Junior University,

*Respondent.*

## Petition for a Rehearing in Bank

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# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 200

In the Matter of the Estate of JANET M. PECK,

*Deceased.*

AARON M. SARGENT, CORNELIA M. SARGENT, MADELYN GEORGIAN, Guardian ad Litem of HELEN M. SARGENT, JR., FRANK M. HOWELL, JR., ORRIN P. HOWELL, MARIETTA GANN BUNDY, ELIZABETH GANN HANDEL, LOUISE FLINN, FRED HOWELL, CHARLOTTE MORE MELONEY, FRANK MORE and MARGARET MORE WHITE,

*Petitioners,*

vs.

THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY,

*Respondent.*

## Petition for a Rehearing in Bank

*To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Petitioners, and each of them, apply to this Court, and the several Justices thereof, for a Rehearing in Bank, and other relief, on the following grounds:

*First:* The judgments of the Superior Court and the District Court of Appeal are invalid, being in violation of the Constitution of the United States. Consequently, the due process and equal protection clauses in the Fourteenth Amendment require a reversal.

*Second:* The Order Denying Certiorari is unconstitutional.

*Third:* The questions here presented are of such public importance as to require an exercise of jurisdiction on certiorari.

*Fourth:* Decedent's trust is invalid in permitting an unconstitutional interference with the freedom of speech and press clauses in the First Amendment secured against State infringement by the Fourteenth Amendment.

The power to mold public opinion by advocating appeasement, relinquishment of American sovereignty, and surrender of the government of the United States into the control of a foreign power as a means of preventing war, is another unconstitutional power under the trust and a violation of Title 18 United States Code, Secs. 2381 and 2385.

Under the rule enunciated in *Shelley v. Kraemer*, 334 U.S. 1, the act of the State judiciary in enforcing such a trust is a violation of the Fourteenth Amendment.

*Fifth:* When the acts and proceedings of this Court are tested by the Rule of *Constitutional Supremacy* laid down in *Marbury v. Madison*, 1 Cranch. 137, it is clear that the Order Denying Certiorari is invalid.[1]

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1. See also opinion of Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, at 376, commenting on the interpretation of judicial power urged by the Attorney General of the State of Virginia: "If such be the constitution, *it is the duty of the court to bow with respectful submission to its provisions.* If such be not the constitution, it is equally the duty of this court to say so; and to perform that task which the American people have assigned to the judicial department."

In this Petition, Respondent "The Board of Trustees of The Leland Stanford Junior University" is referred to as "Stanford". Unless otherwise stated, all italics and other emphasis used herein is ours.

## OUTLINE OF STATE COURT PROCEEDINGS

### The Superior Court.

After a trial, the Court entered a minute order awarding the estate to Stanford. No reasons were given to sustain the order. The will contained no such bequest. The will sought to establish a trust for specified purposes requiring no cooperation or active participation by the University or any of its departments.

This arbitrary award was an act of usurpation and a denial of due process and equal protection in violation of the Fourteenth Amendment.

### The District Court of Appeal.

Stanford filed a brief that urged the Court to adopt a false and untruthful interpretation of the will. The name and prestige of the University were used as a "*Cloak of Respectability*" to aid in the perpetration of the fraud. The Court adopted this untruthful presentation and made it the basis of an opinion affirming the judgment.

One of the Justices was challenged for bias. He resisted disqualification; sat during oral argument; and refused to vote either in favor or against the action taken by his associates. The "opinion" was rendered by the other two members of the panel. Petitioners were thus deprived of their property rights in violation of law.

The Court "*invented*" a *special* rule of interpretation for the purposes of *this* case. It refused to apply the statutory rules controlling the interpretation of wills in other cases:

and it declined to enforce, without discrimination, the constitutional provision and statute under which decedent's trust is invalid. Its conduct, in this respect amounted to judicial usurpation and a violation of the rule in *Shelley v. Kraemer*, 334 U.S. 1.

One of the Stanford Trustees is a Justice of the State Supreme Court. In petitioning for a hearing, we noted his disqualification and requested appointment of a Justice pro tem to make a full panel of seven.[2] That request was disregarded. The State Supreme Court denied a hearing without opinion. It became necessary to apply to this Court for relief.

## CONSTITUTIONAL SUPREMACY

The judgment under review can only be sustained on the theory of *judicial supremacy*—the existence of some power at the State level authorizing the judiciary to impose its will on litigants in disregard of the State Constitution and Acts of the State Legislature. There is no basis for any concept of judicial supremacy under the Constitution or Laws of the State of California.

Article III, Sec. 1 of the State Constitution provides for a separation of powers and it prohibits each Department from exercising functions pertaining to either of the others. The Judiciary owes its existence to Article VI. It was ordained and established by the State Constitution, which derives its authority from the People; not from the act of any judicial officer.[3] Under Article XX, Sec. 3, all state officials, including members of the judiciary, are bound by

2. Rec. Item No. 17, Petition for Hearing in the Supreme Court, at p. 2.

3. Preamble: "We, the people of the state of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution."

oath to support its provisions.[4] In addition, State judicial officers are required to take the oath prescribed by Article VI of the Constitution of the United States.

It is the Constitution, and not the Judiciary of the State of California, that is *supreme*. The attempt, of the State judiciary, to exercise such supreme power was an act of usurpation.

## CONSTITUTIONAL SUPREMACY AT THE FEDERAL LEVEL

The conduct of the State Courts was so flagrant as to deprive Petitioners of the benefit of a fair and adequate review on appeal. Under state law, such review is a matter of right.[5] Under such circumstances, it is the duty of this Court to grant relief.

The Order Denying Certiorari must, in the nature of the case, have as its basis (1) the exercise of an arbitrary power of selection, (2) majority action preventing the minority from issuing a writ, or (3) resort to the Legislative prerogative of denying an application on grounds of public policy or expediency.

If the Federal Constitution provided for *Judicial Supremacy* there might be a basis for argument in support of this dangerous power. However, it does not so provide. Under our Constitutional System it is the *Constitution* and not the Judiciary that is supreme. That fact was recognized at an early date by the opinion of Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 176-177:

4. "*Oath of Office*. Members of the legislature, and all officers, *executive and judicial* * * * shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation:

"'I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of the state of California, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability.'"

5. Probate Code, Sec. 1240.

"If a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs. * * *

"Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution * * *. This doctrine would subvert the very foundation of all written constitutions."

The Constitution derives its authority directly from the People, who acted in State Conventions held to debate the issue of ratification.[6] This Court owes its existence to, and it derives its power from that Constitution.

The Constitutional oath prescribed by Article VI is more than a technicality or formality. It was intended to impose a solemn obligation, binding equally on executive, legislative, and judicial officers, both State and Federal. It is part of the Article containing the supremacy clause.[7] That oath

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6. *McCulloch v. Maryland*, 4 U.S. (4 Wheat.) 420: "The People acted on the Constitution 'in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention * * *. When they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measure of the State governments. From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is ordained and established in the name of the people; and is declared to be ordained, in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.'"

7. Article VI: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, *shall be bound* by Oath or Affirmation, to support this Constitution; * * *"

was prescribed by men familiar with disloyalty and treason; men who remembered the treasonable activities of Benedict Arnold!

It follows from the supremacy clause, and this oath provision, that there is no power in the Congress to confer on this Court a power whereby the rights of some litigants may be sacrificed on the ground of expediency, while relief is given, in similar circumstances, to others.

## CERTIORARI POWER OF INDIVIDUAL JUSTICES

It is the duty of each Justice to be bound by the Constitution and to act in accordance with his oath. There is no power in any other Justice to interfere with the discharge of this responsibility. It follows that the majority has no power to prevent issuance of a writ, when the Clerk is given a contrary instruction by the minority.

## POLITICAL AND LEGISLATIVE POWER

The powers of a legislative body include the right to act or refuse to act in a given situation; to grant or deny relief on public policy grounds, or for reasons of expediency. Political questions are determined by the Congress or the Executive. The judicial power does not extend to matters that are political or legislative in character.[8] The writ of certiorari may not lawfully be granted or withheld on those grounds. Section 1257 of Title 28 United States Code confers no legislative or political power.

8. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 403: "It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it *must* take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us."

## THE IMPERATIVE NEED OF INTEGRITY IN THE JUDICIAL PROCESS

The oath provision and the supremacy clause in Article VI apply to all public officials at all levels. Each has a duty, power and responsibility concurrent with and equal to that of all the others.

Judges of lower courts have the right and the duty to disregard unconstitutional orders and mandates.[9]

State Legislatures have the power, under the Tenth Amendment, to enact laws protecting their citizens from acts of usurpation.[10]

In his Farewell Address, our first President warned his countrymen of the dangers inherent in all acts of usurpation.

In the last analysis the authority of the Judiciary depends on public acceptance of its opinions; on its reputation for truth, fairness and integrity. Judgments based on falsehood cannot be tolerated if we are to maintain the integrity and the high standards in the administration of justice that must be observed in this time of national crisis.

## PUBLIC IMPORTANCE OF THESE QUESTIONS

There are no questions of greater importance at this time than those concerning the relationship of this Court to the Constitution; Constitutional Supremacy; Sanctity and legal effect of the Constitutional Oath; and the defenses against usurpation established by the Constitution of the United States. Recent events have exposed some of the Constitutional dangers confronting us.

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9. "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution".—"Kentucky Resolutions" drafted by Thomas Jefferson for adoption by the Kentucky Legislature.

10. See remarks of Congressman Alford and editorials from the Pioche Record, of Pioche, Nevada, House Proceedings of Sept. 5, 1959; Cong. Rec. pp. 16712-16723.

*Economic Dictatorship.* On August 5, 1956, the Indianapolis Star carried a news dispatch on the *Industrial College of the Armed Forces* quoting from the secret address delivered by Dr. Charles Fairman, Professor of Law at Harvard. This article, headlined "*Armed Forces Lecture Bares Blueprint for U. S. Dictatorship*", reported on the incident as follows:

> "Fairman advised his listeners not to worry about constitutional objections and advocated legislation which would put all civilian and military activities under the control of a federal super-government in the event of a devastating atomic attack * * *.
>
> "Fairman said new legislation should 'stake out the lines by which that central leadership would be exercised.' The national government must act 'upon and through' the state governments, rather than through its own branches.
>
> "'The national government must be geared directly to the states so that leadership at the top will be transmitted to and through the state and local administrative machinery.' * * *
>
> "'This is almost wholly without precedent. * * * Don't worry about constitutional objections. I assure you that the Constitution, rightly understood, will sustain all that needs to be done * * * Our problem is operational, not Constitutional.'"

An editorial, "The Way to Dictatorship", in the August 7, 1956, issue of the same newspaper made the following comment:

> "'They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety,' said Benjamin Franklin.
>
> "A story in The Sunday Star about a formerly secret proposal for a super Federal government to be imposed for 'civil defense' purposes reflects just such a demand. It proposes that Americans surrender their traditional

liberties under the guise of providing them safety in time of crisis.

"This proposal was made by a Dr. Charles Fairman, Professor of Law at Harvard, in a speech to the Industrial College of the Armed Forces. It was a serious proposal to substitute Federal authority for the authority of all state governments in matters concerning civil defense * * *

"What Dr. Fairman proposes is the abolition of the American constitutional form of government under the guise of preparing for an emergency. He proposes that the authority of the states be completely surrendered to the Federal government. Using the excuse of the threat of 'nuclear war' as a pretext, he would simply take away by Federal statute the police powers guaranteed to the states by Article 10 of the Constitution. Federal gauleiters would be set up in military districts with the power to overrule the acts of state governors. Their 'signature would be in lieu of his' when acting 'in respect of all things essential to the Federal government's war effort.'"

Presumably, the Commander in Chief powers of the President would be used to put such a plan into operation. Courses in "Education", now being conducted by the Department of Defense, are designed to train civilians needed for key positions in this sort of military dictatorship.[11]

*Future Depressions.* The operation of such a dictatorial plan is by no means confined to the *military* situation that might exist in the event of a nuclear attack. An economic crisis brought on by foreign demands on our gold supply could cause a depression that might be used as a pretext

11. Instructional material currently in use by the Industrial College of the Armed Forces includes a correspondence course for "Selected Civilians for Important Managerial Positions", dealing with subjects such as Human Resources; Natural Resources; Electric Power, Gas and Telecommunications; United States Economic Foreign Policy; Foreign Aid; and Economic Stabilization.

for the exercise of these unconstitutional powers. One of the most serious aspects of the present situation is the fact that there are so-called "respectable" people more interested in their own investments, power, and influence, than in the security of the United States—men willing to do almost anything for money, power, or influence. Some of the bankers and industrialists greeting and conferring honors on Nikita Khrushchev may be in this category.[12] It has been recognized for some time that so-called "respectable" people constitute the most dangerous type of risk to national security.

*The Surrender Plan.* On August 14, 1958, the Honorable Richard Russell, Senator from the State of Georgia, made the following statement on the floor of the United States Senate:

> "The honor of the present generation and the fate of generations yet unborn demand that we use the great heritage of our matchless resources in preparing to destroy anyone who would attack us, instead of cowardly counting the cost and developing plans for surrender."[13]

The Senator referred to a study initiated by the Department of Defense having for its apparent object a possible surrender by the Government of the United States. He

12. See New York Herald Tribune, issue of September 18, 1959, page 10, containing guest list for reception given by former New York Governor Averell Harriman; and guest list at luncheon arranged by Mrs. Robert F. Wagner at the Waldorf-Astoria Hotel, New York City. See also New York Times, issue of September 25, 1959, containing list of guests at the dinner given at Washington, D. C., by Eric Ridder, publisher of The Journal of Commerce. Compare House Un-American Activities Committee Document "The Crimes of Khrushchev", Part II, Consultations with Drs. Lev E. Dobrianski, et al (Sept. 9-11, 1959), exposing the Genocide and other crimes of the man honored by these "notables."

13. Vol. 104, Cong. Rec. Part 14, Senate Proceedings of Aug. 14, 1958, p. 17516.

referred, in particular, to a book, "Strategic Surrender", by Paul Kecskemeti, published in 1958 by Stanford University Press. The printing and distribution of that book is another one of the commercial, non-charitable operations of Respondent. Other reference material respecting this incident is cited in the footnote.[14]

The Kecskemeti book, published by Stanford, discusses problems involved in the surrenders of France, Nazi Germany, and Japan. Our country has no war plans contemplating invasion of any foreign nation. Evidently the researchers had in mind a program for delivery of control of our own government into the hands of a foreign power.

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The Federal Constitution provides for a defense, in depth, against the dangers of usurpation, abdication, and surrender. There is no legal place in our constitutional scheme of things for Benedict Arnolds or others tempted to bargain away *our* rights for the sake of *their own* personal or financial security.

We submit that the time has come for this Court to define its own jurisdiction and relationship to the Constitution of the United States.

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## INTERFERENCE WITH FREEDOM OF THE PRESS

Decedent's will requires establishement of a Foundation with power to mold public opinion as a means of preventing

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14. The studies referred to were conducted by Dr. Ellis A. Johnson, Director of the Operations Research Office of Johns Hopkins University—a nonprofit scientific organization operated for the Army; and Rand Corporation, a nonprofit scientific agency operated for the Air Force by a group of universities. See Vol. 104, Cong. Rec. Part 14—Senate Proceedings of August 14, 1958, pp. 17510-17511, involving insertion, by Senator Symington, of article from Aug. 14, 1958, issue of New York Mirror; Vol. 104, Part 13, Senate Proceedings of Aug. 8, 1958, at p. 16668, where Senator Symington inserted article from St. Louis Post Dispatch, by Gen. Thomas Phillips, Military Analyst; and discussion at Vol. 104, Part 14, pp. 17517-17526, inclusive.

war. There is authority to make a conscious effort to control public opinion and media of communication in achieving that end; power to disseminate propaganda and otherwise undermine the freedom and integrity of the press. These broad powers are capable of infringing rights secured by the First and Fourteenth Amendments, and are therefore unconstitutional. We submit that decedent's trust should be held invalid on this ground.

## POWER TO ADVOCATE APPEASEMENT AND SURRENDER

The trust powers are so broad that decedent's Foundation could, without violating the will, advocate and support disloyalty and even treason, according to the plan suggested by the surrender program exposed on the floor of the United States Senate. Such powers are surely in violation of Title 18, United States Code, Sections 2381 and 2385, and the treason clause (Article III, Sec. 3) of the Federal Constitution, and should be so declared.

Wherefore, Petitioners pray that this Court, and the several Justices thereof, grant the following relief:

*First:* A rehearing in bank and entry of an order granting certiorari;

*Second:* Entry on the record of the action taken by individual Justices in respect to this Petition, and the relief sought thereunder;

*Third:* Oral argument on the within Petition, directed to the public importance of the questions presented and the need for granting certiorari in reference thereto.

Dated: November 4, 1959.

Respectfully submitted,

AARON M. SARGENT
*Attorney for Petitioners*

## Certificate of Counsel

Pursuant to Rule 58, I hereby certify that the foregoing Petition for a Rehearing in Bank is presented in good faith and not for delay; I further certify that said Petition is restricted to the grounds set forth in subdivision 2 of said Rule 58, to-wit: To intervening circumstances of substantial or controlling effect, and to other substantial grounds available to Petitioners, although not previously presented.

Dated: November 4, 1959.

AARON M. SARGENT
*Attorney for Petitioners*

## Appendix Follows

## *Appendix*

### ARTICLE VI

"*This Constitution*, and the *Laws of the United States* which shall be made in Pursuance thereof; * * * shall be the *supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

"The Senators and Representatives, before mentioned, and the Members of the several State Legislatures, and *all* executive *and judicial Officers, both of the United States* and of the several States, *shall be bound by Oath* or Affirmation, *to support* this *Constitution*; * * *"

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### 28 USCA SEC. 453

"Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ..... do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ..... according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.'"

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### SUPREME COURT RULE 5(4)

"Upon being admitted, each applicant shall take and subscribe the following oath or affirmation, viz:

"'I, ....., do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.'"